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No. 82-2053

IN THE

Supreme Court of the United States

October Term, 1982

ELMER H. SINGLETON,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Respondent, Virginia Electric and Power Company (Vepco), has consistently referred to Virginia law to support its position. However, the Virginia Supreme Court has recently discussed the issue of contributory negligence in an electrocution case where the alleged negligence of the Plaintiff was much greater than that attributable to the petitioner in the case *sub judice*, yet has held that this issue should be resolved by the jury. The Respondent has failed to bring this case to the Court's attention. Other objections to the brief[1] will be cited in the body of this Reply.[2]

[1]References to the record for this case shall be made to the Appendix filed with the Fourth Circuit.

[2]For example, the Respondent has commented that the Petitioner incorrectly stated that the trial court ruled that a jury issue existed as to Singleton's negligence (Respondent's Brief, p 2). We quote the trial court:

> With those comments I will merely let the case go forward to the jury on both the issues of primary negligence on the part of the Power Company and contributory negligence on the part of Mr. Singleton.

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ARGUMENT

1. RECENT VIRGINIA LAW SUPPORTS PETITIONER.

Three (3) days after the Petition was filed the Virginia Supreme Court handed down its decision in *Vepco v. Winesett*, ____ Va.____, 303 S.E. 2d 868 (1983).[3] Although the Petitioner cited this case,[4] and counsel for Respondent was also counsel in the *Winesett* case, the Brief in Opposition omits any reference to this decision. Such an ommission runs contrary to the admonition of Chief Justice Burger that the Court "...must rely on counsel to present issues fully and fairly and counsel have a continuing duty to inform the Court of *any* development which may conceivably affect an outcome."[5] (emphasis added).

In *Winesett* the administrator of James Woodrow Winesett filed an action against Vepco, alleging that Vepco's negligent operation and maintenance of distribution wires had caused Mr. Winesett's death by electrocution while he was trimming a tree on private property. Branches of this tree had grown through utility wires maintained by Vepco. The owner, Mr. Robert Carl, had telephoned Vepco and reported the problem of a possible electrical hazard, but no action was taken. Mr. Carl then decided to remove the tree at his own expense, and hired Mr. Winesett to do the job. He did not discuss directly with Winesett the existence of the power lines, or mention any "sparking" problems.

Winesett and a helper, Thomas P. McClennan, attempted to cut down the tree. Neither had knowledge that the lines running through the tree were uninsulated high-voltage lines, although they had seen the wires. They were concerned that they might break the wires, and therefore

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[3]The Petition was filed on June 14, 1983; *Winesett* was decided on June 17, 1983.

[4]Petition, p 4.

[5]*Fusari v Steinberg*, 419 U.S. 379, 391 (1974).

attempted to trim the branches to avoid the wires being hit by tree limbs. Winesett climbed an aluminum ladder and began trimming branches with an electric chain saw. After about half an hour, McClennan heard Winesett scream, "Unplug the saw." Each time McClennan touched the ladder or the legs of Winesett he received an electrical shock, and Winesett eventually fell from the tree and died from cardiac arrest caused by electrocution. The last branch cut by Winesett had made contact with a high-voltage utility wire near the tree, thereby conducting electrical current through the tree, electrocuting Winesett.

The jury found that Vepco was negligent and that Winesett was free of contributory negligence, and awarded damages in the amount of $182,796.00. The trial court denied Vepco's motion for judgment notwithstanding the verdict, and Vepco appealed to the Virginia Supreme Court. It argued that the evidence showed "conclusively" that Winesett was contributorily negligent as a matter of law. Just as in the Brief in Opposition filed with this Court, it relied on *Watson v Vepco*, 199 Va. 570, 100 S.E.2d 774 (1957).[6]

The Virginia Supreme Court has rejected Vepco's arguments. It reaffirmed that as a general rule contributory negligence is a jury issue, and that at the trial level Vepco had the burden of proving contributory negligence. The Court then stated as follows:

> On appeal, however, Vepco has the heavier burden of showing "that there is no conflict in the evidence of contributory negligence, and that there is no direct

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[6]The trial judge in the *Singleton* case admittedly based his Order on *Watson*. "I must grant the motion pursuant primarily to the *Watson* case decided by the Virginia Supreme Court..." 19A

> and reasonable inference to be drawn from the evidence as a whole, sustaining the conclusion that. . .[plaintiff's decedent] was free of contributory negligence."[7]

The Virginia Supreme Court cited with approval the case of *Vepco v Mabin*, 203 Va. 490, 125 S.E.2d 145 (1962), where it affirmed the trial court's decision that the plaintiff was not contributorily negligent as a matter of law where he received injuries while crawling under high-voltage utility wires as he worked on a roof. The court noted that the evidence and the testimony of the plaintiff himself was in question, and that reasonable minds could differ as to the effect of the plaintiff's testimony, thus precluding contributory negligence as a matter of law.

In the case *sub judice*, when the petitioner became aware of the pending *Winesett* case, it was brought to the attention of the Fourth Circuit.[8] Mr. Singleton requested the Fourth Circuit to withhold its final judgment, and stated: "If in June of 1983 the Virginia Supreme Court holds that under Virginia law Mr. Winesett was free of contributory negligence as a matter of law, how can it then be said that Mr. Singleton was not likewise free."[9] Nevertheless, the Fourth Circuit refused to await a clarification of the Virginia law and denied the Petition to Rehear.

The argument contained in the Respondent's brief relies almost exclusively on its own interpretation of Virginia law. It refers to Virginia law no less than nineteen (19) times in its eleven (11) page brief, and cites the same two cases specifically rejected by the Virginia Supreme Court in the *Winesett* case.[10] Although the respondent has placed heavy emphasis on the substantive law of Virginia concerning

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[7] *Winesett, supra*, 303 S.E.2d at 872.

[8] Petition to Rehear, p 3.

[9] Petition to Rehear, p 6.

[10] **See** *Winesett, supra*, 303 S.E.2d at 872, where the court stated that Vepco relied principally on *Smith v Vepco*, 204 Va. 128, 129 S.E.2d 655 (1963), and *Watson v Vepco*, 199 Va. 570, 100 S.E.2d 774 (1957).

contributory negligence as a matter of law, it has failed to mention the most significant case on this issue.

In light of *Winesett*, the Respondent must now concede that Virginia law gives no support to its position. Whatever ambiguity existed, if any, in the substantive law of Virginia concerning contributory negligence has now been decided in Mr. Singleton's favor, and gives compelling weight to his Petition. At the trial court, the Fourth Circuit, and now the Supreme Court, the Respondent has consistently claimed that Virginia law supported its position. This claim is no longer justified. Virginia law has reaffirmed the long-standing principle that the jury is the best judge of credibility and the reasonableness of a plaintiff's actions, and that where the minds of reasonable men could differ as to this issue its determination should remain in the hands of the jury.

2. EVIDENCE MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF.

The Respondent has acknowledged that the federal standard of review in diversity of citizenship cases requires that the evidence must be viewed in the light most favorable to the Plantiff.[11] Nevertheless, it then proceeded to supply facts and inferences that support the position of the Respondent, not that of Mr. Singleton. Whether the uninsulated wires were in plain view was a vigorously contested issue at the trial, yet the Respondent states that the wires were in "plain view"[12] and that photographs and testimony of "all witnesses" established that such lines were plainly visible.[13] It freely substitutes its opinion for that of the jury. A determination of this fact was soley within the province of the men and women who heard the testimony

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[11]Respondent's Brief, p 4.
[12]Respondent's Brief, p 5.
[13]Respondent's Brief, p 6.

and weighed the evidence, and judged the credibility of the witnesses. In short, the Respondent has refused to view the facts in the light most favorable to the Plaintiff, and has put forth selected portions of the transcript which favor its position.

Nevertheless, contrary to the assertions of the Respondent, there were witnesses who gave inferences to the jury that these lines were not open and obvious. Even the landowner, Arthur J. Lancaster, Jr.,[14] when shown a photograph of the wires against a cloudy sky, admitted that they could be dificult to see:

> [Counsel for Singleton]: You see these wires here very clearly?
> [Mr. Lancaster]: Yes, sir.
> [Counsel for Singleton]: You see that wire there very clearly?
> [Mr. Lancaster]: No, I can't see that one right there.
> [Counsel for Singleton]: That blends right through the clouds?
> [Mr. Lancaster]: I don't know.
> [Counsel for Singleton]: You want me to hold it closer?
> [Mr. Lancaster]: I can't see the wire, but don't forget that is a picture.
> [Counsel for Singleton]: That would show you that it's possible these could blend in with the clouds?
> [Mr. Lancaster]: I see that, but as I say it's a picture. It could have been poor photography.

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[14]Mr. Lancaster was initially a defendant in the lawsuit. The trial judge entered a directed verdict in his favor at the close of the Plaintiff's evidence, but this judgment was not brought forward on appeal to the Fourth Circuit. However, at oral argument Justice Clement Haynsworth expressed surprise that the trial court had dismissed Lancaster.

Mr. Lancaster's employee, Wayne Sawyer, testified that he and Mr. Lancaster tried to warn each and every driver who came on the premises, and that they would meet the drivers and warn them to watch our for the wires.

> [Mr. Sawyer]: Whenever we called Pantego Distributors—we would like set up a time and date before they come and they always were to call before the truck left Pantego to make arrangements so somebody would be there.
> [Counsel for Vepco]: Why would you have those arrangements?
> [Mr. Sawyer]: Well, you had to sign a ticket and most of the truck drivers wanted a check when they came, so somebody could be there to show them where to dump and also to watch out for the wires.

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* * * * * * * * * * *

> [Counsel for Vepco]: Why was it you told them about these wires?
> [Mr. Sawyer]: Well, we were trying to avoid a situation that has happened now. We didn't want anybody getting tangled up in the wires.

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* * * * * * * * * * *

> [Counsel for Singleton]: Isn't it true that when the truckers arrived at the dump site the first thing you do

is get them out and point the wires out and show them to them? You would actually point the wires out to them and show them, wouldn't you?
[Mr. Sawyer]: Yes, sir.

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When Mr. Singleton arrived at the dump site he testified that it was partially cloudy (163A). He denied that he had been warned of the wires (263A). He was the only truck driver who had not been warned by Lancaster or his employees of the presence of overhead wires before unloading the wood chips (344A). Thus, even though the Respondent claims these wires were so open and obvious that anyone would have seen them, the *first* driver who was not warned was severly injured.

In light of such testimony, and where credibility was obviously a factor, it was the jury's function to determine the fact issues of "visibility" and "negligence." The trial court usurped the powers of the jury by substituting its judgment for that of the jury. Under these circumstances it violated Mr. Singleton's Seventh Amendment right to trial by jury. Any seeming curtailment of that right should be scrutinized with the utmost care. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

CONCLUSION

The Respondent's reliance on Virginia law is without merit. *Winesett v Vepco, supra,* has revealed that the trial court and the Fourth Circuit were in error in their interpretation of Virginia law concerning contributory negligence, and that even under state law the jury's decision in *Singleton* was proper.

Furthermore, each citizen of the United States looks to the Supreme Court as the ultimate enforcer of its Constitutional rights, of which trial by jury may indeed be the most sacred. It is respectfully contended that the Court should exercise its power to grant certiorari and ultimately reverse the decision of the lower court.

Respectfully submitted this the 22nd day of August, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, three (3) copies of the Reply Brief were mailed postage prepaid, to Mr. G.H. Gromel, Jr. and Mr. Matthew J. Calvert, of HUNTON & WILLIAMS, P.O. Box 1535, Richmond, Virginia 23212, counsel for the respondent. I further certify that all parties required to be served have been served.

This the 22nd day of August, 1983.

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